

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 53 of 1986 & 145 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

CAMA HOTELS LIMITED

Appearance:

MR BB NAYAK with MR MANISH R BHATT for Petitioner
MR MANISH J SHAH for Respondent No. 1

CORAM: B.C. PATEL & K.M. MEHTA, JJ.

DATE OF JUDGMENT : 18/04/2000

C.A.V. JUDGMENT (Per Mehta, J.)

1. In these matters, at the instance of Commissioner of Income Tax, Gujarat-I, Ahmedabad has raised the following question of law for determination of this court under section 256(2) of the Income Tax Act:

"Whether on the facts and in the circumstances of the case the assessee would be entitled to claim depreciation in respect of hotel building, furniture and fixtures as "plant" under the Income Tax Rules, 1962?"

2. Cama Hotels Ltd, an assessee-respondent herein, is a company engaged in hotel business. In the present applications we are concerned with Assessment Years 1980-81, 1981-82 and 1982-83 respectively. The assessee claimed depreciation in respect of hotel building, furniture and fixtures as "Plant" as per the provisions

of Income Tax Act and Rules. The Income Tax Officer, Ahmedabad by his order, dated 1.2.1983 (Assessment Year 1981-82) did not accept the claim of the assessee. According to him in the table of rates at which depreciation is admissible as per appendix - 1 of the Income Tax Rules 1962 the assessee as regards building is concerned it is entitled to depreciation at the rates mentioned which is applicable to building and is not applicable to as "machinery and plant". Since the building, furniture and fittings, machinery and plant are separately classified in the said appendix the ITO held that the assessee's building was not entitled to depreciation at a higher rate as machinery and plant than that stipulated in the said appendix in respect of hotel, building, furniture and fixtures. According to him the assessee is entitled to depreciation on the building as per Cl.1 of Table of rates at which the depreciation is admissible as stated in Appendix 1 (enacted under Rule 5). According to the Income Tax Officer the building is not entitled to depreciation as plant as stated under Cl.3 of the said Schedule and that building is not entitled to higher rate of depreciation as per clause 3 to Appendix 1 enacted under Rule 5 of Income Tax Rules, 1962. Similar order was passed for the Assessment Year 1982-83 also.

3. Being aggrieved and dissatisfied with the aforesaid order of the Income Tax Officer the assessee filed an appeal before the CIT(Appeals). The CIT (Appeals), Ahmedabad by order dated 8.8.1984 for the Assessment Year 1981-82 has held that it would be carrying the definition of plant too far to say that even the "building" forms part of the plant when building has been separately described from plant in Section 32 for the purpose of allowance of depreciation and separate rates of depreciation are provided under the rules on "building" and separate for "plant", and thereby upheld the order of the Income Tax Officer. Similar order was also passed for the Assessment Year 1982-83.

4. Being aggrieved and dissatisfied with the aforesaid order of the CIT(Appeals) the assessee preferred appeal before the Income Tax (Appellate) Tribunal(hereinafter referred to as "the Tribunal") and the Tribunal by its order dated 5.8.1983 after relying upon the judgment of the Tribunal at Madras in the case of Hotel Sreelekha vs CIT partly allowed the appeal of the assessee and held that " the assessee has referred to the fact that the premises in question is certainly airconditioned which may be regarded as a plant which is let out inseparably

with the building. But, we do not wish to look at the building as an adjunct of an airconditioning plant which would be standing the matter upside down for the purpose of bringing the entire asset into the category of plant. Instead looking at the matter straight it is a case of the airconditioning plant and other fixture and furniture being adjunct of the building designed to serve as a hotel which by itself must be regarded as a plant because it is an essential part of the trading act of the assessee. Whatever to be the fixtures and furnitures that are in the premises that entire premises is by itself an integral unit, a commercial asset and the tool of the trade of the assessee. All of them are inseparable and constitute one since commercial asset with which the assessee plies his trade and derives the income. Therefore, the commercial asset being an inseparable combination of building, plant, furnitures etc is to be treated as a 'plant' and the assessee is entitled to depreciation at the appropriate rate. We, therefore, deem it fit to set aside the orders of the authorities below and direct the Income Tax Officer to re-compute the total income after verifying and allowing the claim of the assessee by treating the hotel premises as 'plant'. The appeal is allowed".

5. Before we discuss the problem raised in the reference, let us look at the relevant statutory provisions of the Act.

STATUTORY BACKGROUND:

6. Section 32 of the Act provides for depreciation.

"32.Depreciation-(1) in respect of depreciation of buildings, machinery, plant or furniture owned by the assessee and used for the purpose of the business or profession, the following deductions shall, subject to the provisions of section 34, be allowed:

(i)

(ii)

Explanation 1

Explanation 2 For the purpose of this clause

"written down value of the block of assets" shall have the same meaning as in clause (c) of subsection (6) of section 43."

Section 43 defines certain terms relevant to income from profits and gains of business or profession.

"43(1) ...

43(2) ...

Section 43(3) defines "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purpose of business or profession.

Section 295 of the Act provides power to make rules.

Section 295(1) provides that the Board may, subject to the control of the Central Government, by notification in the gazette of India, make rules for the whole or any part of India for carrying out the purposes of this Act. Section 295(2)(d) of the Act provides "the percentage on the written down value which may be allowed as depreciation in respect of buildings, machinery, plant or furniture.

Rule 5:

Rule 5 of the Income Tax Rules provides for depreciation. Original Rule 5 as amended by the IT(Third Amendment) Rules 1964, IT (Sixth Amdt) Rules 1969 and IT (Fourth Amendment) Rules 1971 reads as under:

"Depreciation--(1) Subject to the provisions of Sub-rules (2) and (3) the allowance under clause (i) of clause (ii) of Subsection (1) of section 32 in respect of depreciation of buildings, machinery, plant or furniture of the allowance under clause (i) of subsection (1A) of section 32 in respect of depreciation of any structure work referred to in that subsection shall be calculated at that percentage specified in the second column of the Table in Part I of Appendix I to these rules on the actual cost, or as the case may be, the written down value of such of the assets aforesaid as are used for the purposes of the business or profession of the assessee at any time during the previous year.

Provided that... ..

(2) In the case of a

(3) In the case of a

(4) Notwithstanding anything contained in Sub-rules (1) to (3) for the assessment year 1961-62 or any earlier assessment year, depreciation in respect of buildings, machinery, plant or furniture shall be allowed at percentages and in the manner specified in rule 8 of the Indian Income Tax Rules, 1922".

Along with that there is a table of rates at which depreciation is admissible which is contained in Appendix I under Rule 5. Same Appendix I is as follows:

APPENDIX I

(See Rule 5)

TABLE OF RATES AT WHICH DEPRECIATION IS ADMISSIBLE

Block of assets	Depreciation
allowance as percentage	
of written down value	

1. Buildings (See Notes 1 to 3 below the Table)

(1) , , .

(2)

(3)(i) Buildings used as hotels
(ii) Buildings with dwelling units 20 each with plinth area not exceeding 80 Sq.Mtrs

(4)

II. Furniture and Fittings

(1)

(2)

III. Machinery and Plant

(i) Machinery and plant other than

those covered by Subitems (1A), (2) and
(3) below 25

(1A) 20

7. Before we discuss some Indian authorities, there are some English authorities which throw light on the interpretation of word "plant"

7.1 In (1887) 19 QBD (Yarmouth vs France) Relevant page 659 Lindley, L.J. stated that the next question is whethere the horse which injured the plaintiff's "plant" with the meaning of section 1 sub.section 1 of the Act. There is no definition of plant in the Act:, but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business,--not his stock in trade which he buys or makes for sale, but all goods and chattel, fixed or moveable, live or dead, which he keeps for permanent employment in his business.

7.2 In (1943-44) Law Reports Chancery Division: J.Lyons & Co vs Attorney General Page 281 Justice Uthwat has accepted the definition of Lindley L.J. in Yarmouth vs France and observed that "Plant" includes whatever apparatus or instruments are used by a businessman in carrying on his business. The term does not include stock-in-trade nor does it include the place in which the business is carried on. Whether any particular article more properly falls within "plant" as thus understood or in some other category depends on all the circumstances of the case.

7.3 In Inland Revenue Commissioners vs Barclay, Curle & Co.Ltd reported in 76 ITR 62 it was observed that "it seems to me that every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and that it is wrong to regard either the concrete or anyother part of the dock as a mere setting or part of the premises in which this operation takes place. The whole dock is, I think, the means by which or plant with which, the operation is performed". Later on page 75 it was observed that "In order to decide whether particular subject is an apparatus, it seems obvious that an inquiry has to be made as to what operation it performs. The functional test is therefore essential at any rate as a preliminary. The function which the dry dock performs is

that of a hydraulic lift taking ships from the water on to dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides. It is unrealistic, in my view, to consider the concrete work in isolation from the rest of the dry dock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates, valves and pumps. To effect this purpose excavation and concrete work were necessary.

7.4 In HALSBURY'S LAWS OF ENGLAND, VOL.23,4th EDITION
Para 416 it was observed as under:

"Plant" extends to the tools of a man's trade, including whatever apparatus is used by a business man or a professional person for carrying on his business or profession. See *Yarmouth v France* (1887) 19 QBD 647, DC (an employer's liability case applied in a tax context in e.g. *Hinton (Inspector of Taxes) v Maden and Ireland Ltd* (1959) 3 All ER 356, (1959) WLR 875, 38 TC 391, HL, where knives and lasts used by a shoe manufacturer were held to be plant, and *IRC v Barclay Curle & Co Ltd* (1969) 1 All ER 732 (1969) 1 WLR 675, 45 TC 211, HL) *Munby v Furlong (Inspector of Taxes)* (1977) Ch 359 (1977) 2 All ER 953 (1977) STC 232 where law reports and text books purchased by a barrister starting in practice were held to be plant. Other things which have been held to be plant include a bulk used as a floating coal warehouse (*John Hall Junior & Co v Rickman* (1906) 1 KB 311) excavation and concreting for a dry dock (*IRC v Barclay Curle & Co. Ltd*, supra) blocks, silk sarees, rollers and possibly designs used in manufacturing wall paper and fabrics (*McVig (Inspector of Taxes) v Arthur Sunderson & Sons Ltd* (1969) 2 All ER 771 (1969) 1 WLR 1143, 45 ITC 273) movable office partitioning (*Jarold (Inspector of Taxes) v John and Sons Ltd* (1963), a swimming pool and paddling pool with filtration chlorination and heating systems at a caravan site (*Cooke Inspector of Taxes vs Beach Station Caravans Ltd* (1974) 3 All ER 159 (1974) WLR 1398 (1974) STC 402) and soils for storing and dispensing grain (*Schofield (Inspector of taxes) v R & H Hall Ltd* (1975) STC 353 (NICA) approving *Commonwealth of Australia Taxation Comr v Broken Hill Pty Co. Ltd* (1968) 120 CLR 240 at 263 where

it was said that buildings which are more than shelters for workers or their equipment and which play a part themselves in the manufacturing process may be regarded as plant (revsd without affecting this dictum 120 CLR 240 Aust.HC)

8. Now, after reviewing the above English Authorities, we come to the judgment of the Supreme Court in the matter of CIT, AP vs Taj Mahal Hotel reported in 82 ITR 44 (AIR 1972 SC 168) the assessee incurred an expenditure of Rs.57,154/- in installing sanitary fittings and Rs.1,370/- for pipeline fittings. The assessee claimed development rebate on these two items at the rate of 25% under section 10(2)(vib) of the Act amounting in the aggregate to Rs.14,629/-. The Income Tax Officer disallowed the claim. On appeal, the Appellate Assistant Commissioner upheld the disallowance. Appeal was taken to the Appellate Tribunal. The Tribunal rejected the appeal that the sanitary and pipeline fittings did not fall within the meaning of the word "plant". On being moved under section 66(1) of the Act following question was referred for the opinion of the High Court:

"Whether the sanitary fittings and pipelines installed in the King Koti branch of the hotel constituted "plant" within the meaning of section 10(5) of the Act and whether the assessee was entitled to development rebate in respect thereof under section 10(2) of the Act?"

8.A The Division Bench of Andhra Pradesh High Court (Coram: P.Jaganmohan Reddy, C.J (as His Lordship then was) & Venkatesam,J) in the case of Taj Mahal Hotel vs Commissioner of Income Tax reported in AIR 1969 AP 84 in para 11 held as under:

"Sanitary Fittings and Pipeline fittings" are, undoubtedly fixtures employed in carrying on hotel business of boarding and lodging. It is inconceivable that without sanitary fittings and pipeline fittings, the business of a hotelier, like the assessee, can be carried on today. Since there is nothing in the context or the grouping of the words in which the word "plant" is used in section 10(2)(vi-b) to convey a contrary meaning we hold that the sanitary fittings and pipeline fittings being fixtures employed in carrying on trade or business by the

assessee come within the meaning of the word "plant".

8.B The Division Bench, therefore, decided the question in affirmative, i.e. in favour of the assessee.

8.C Being aggrieved and dissatisfied with the decision of the High Court the revenue moved the Supreme Court. After considering the English Authorities, the Supreme Court in para 8 held as under:

"To have sanitary fittings etc in a bathroom is one of the essential amenities or conveniences which are normally provided in any good hotel in the present times.....We are unable to see how the sanitary fittings in a bathroom in hotel will not be "plant" within S.10(vi)(b) read with S.10(5) when it is quite clear that the intention of the legislature was to give it a wide meaning and that is why articles like books and surgical instruments were expressly included in the definition of "plant". In decided cases the High Courts have rightly understood the meaning of the term "plant" in a wide sense".

8.D To have sanitary fittings etc in bath room is one of the essential amenities or conveniences which are normally provided in any good hotel, in the present times. We are unable to see how the sanitary fittings in the bath rooms in a hotel will not be "plant" within section 102 (vib) read with section 10(2)(5) when it is quite clear that the intention of the legislature was to give it a wide meaning and it is why articles like books and surgical instruments were expressly included in the definition of "plant". In decided cases the High Courts have rightly understood the meaning of the term "plant" in a wide sense.

8E. The learned counsel appearing for the assessee relied upon another judgement of the Division Bench of this court in the case of CIT vs Elecon Engineering Co.Ltd reported in 96 ITR 672. The question arose before the Division Bench was whether the drawings and fittings are plant or not. After reviewing several English authorities as well as abovementioned decision the Supreme Court in Taj Mahal case, the Division Bench has held that "there is no doubt that they have a vital function to perform in the manufacture of gear units and Conveyer Idlers which are the articles which the assessee produces. It is with the aid of these drawings and

patterns that the assessee was able to commence its manufacturing activity and they amongst other things constituted the technical data which lay at the root of the assessee's production venture. In the agreements entered into by the assessee with its foreign collaborators, this aspect is brought into bold relief by the use of the expressions that the assessee would receive "all existing and upto date patterns, drawings and information which the authorised manufacturer requires" and complete drawings --adequate and reasonably necessary to manufacture the said idlers in accordance with the designs and specifications. It was also found that as a matter of fact that drawings and patterns formed "the basis of business of manufacturing the machinery in question". It is true that they by themselves do not perform any mechanical operations or processes or that on the commencement of the production of Gears and Idlers it might not be necessary to consult them or that owing to technological advances they might in course of time become obsolete. The factors, however, can not militate against their being plant since they are, as it were, the basic tools of the assessee's trade having a fairly enduring utility. We are, therefore, inclined to agree with the tribunal that drawings and patterns are "Plant" within the meaning of section 32.

9. The learned counsel appearing for the assessee has relied upon the other decisions and the decision of the Supreme Court in the case of Scientific Engg. House Pvt. Ltd vs CIT, A.P reported in 157 ITR 86. In that case, M/s Scientific Engg. House Pvt. Ltd-the assessee manufactures scientific instruments and apparatus like dumpy levellers, levelling staves, prismatic compass etc. It entered into two separate collaboration agreements, one dated March 15, 1961 and the other dated March 31, 1961 with one Metrimex Hungarian Trading Company, Budapest for undertaking the manufacture of microscopes and theodolites under which the said foreign collaborator in consideration of payment agreed to supply to the assessee all the technical know-how required for the manufacture of these instruments. To enable the assessee to manufacture these instruments in India, the foreign collaborator agreed to render "documentation service" by supplying to the assessee an upto date and correct complete set of each of the five types of documents including designs, drawings, charts, plans and other literature as per clause 3.

10. The Assessee claimed certain amount of payment by way of depreciation on "library" on the ground that there was outright purchase of designs, drawings, charts and

other literature which were voluminous occupying almirah-full of storage space and collectively constitute pages of a book and the assessee had claimed depreciation at appropriate rate. The Income Tax Officer rejected the claim. On appeal the Appellate Assistant Commissioner allowed the appeal and directed the Income Tax Officer to allow the depreciation claimed. In the further appeal preferred by the department, the tribunal held that the agreements showed that some of the services which the foreign collaborator was required to render to the assessee were on revenue account and therefore held that payment was partly on capital account and partly on revenue account. Thereafter, the assessee and the revenue sought a reference to the High Court and the Tribunal referred the following question to the High Court:

"Whether on the facts and in the circumstances of the case, and on true interpretation of the collaboration agreements between the assessee and M/s Metrimpey Hungarian Trading Co, Budapest, the payment of Rs.1,60,000/- was attributable partly to the acquisition of depreciable asset and partly to revenue expenditure or wholly towards the acquisition of a depreciable asset?"

11. The High Court held that the assessee was not entitled to any relief either by way of depreciation allowance or on account of revenue expenditure.

12. The Supreme Court after considering the judgment in the case of CIT vs Taj Mahal Hotel 82 ITR 44 and also the judgment of this court in the case of CIT vs Elecon Engg.Co.Ltd reported in 96 ITR 672(Guj) and also after considering the relevant terms of agreements, on page 96 has held that:

"In other words, plant would include any article or object fixed or movable, live or dead, used by a businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or process or is employed in mechanical or industrial business" After considering the aforesaid terms, the Supreme Court held as under:

"In other words, the test would be: Does the article fulfil the function of a plant in the assessee's trading activity? Is it a tool of his

trade with which he carries on his business? If the answer is in the affirmative, it will be a plant".

Thereafter the Supreme Court further held as under:

"Obviously the purpose of rendering such documentation service by supplying these documents to the assessee was to enable it to undertake its trading activity of manufacturing theodolites and microscopes and there can be no doubt that these documents had a vital function to perform in the manufacture of these instruments; in fact it is with the aid of these complete and upto date sets of documents that the assessee was able to commence its manufacturing activity and these documents really formed the basis of the business of manufacturing the instruments in question. True, by themselves, these documents did not perform any mechanical operations or process but that can not militate against their being a plant since they were in a sense the basic tools of the assessee's trade having a fairly enduring utility though owing to technological advances, they might or would in course of time become obsolete. We are, therefore, clearly of the view that the capital asset acquired by the assessee, namely, the technical know-how in the shape of drawings, designs, charts, plans, processing data and other literature fall within the definition of "plant" and is therefore a depreciable asset".

After referring to the decision in the case of CIT vs Elecon Engg Co.Ltd (96 ITR 672) the Supreme Court again observed that:

"We agree and approve the said view"

13. The learned counsel for assessee relied upon the decision of the Gujarat High Court in the case of CIT vs Saurashtra Bottling Pvt.Ltd reported in 232 ITR 270 (Guj) The question which was considered by this High Court was" whether the bottles and shells are plant or not?. After considering the various judgments of the Division Bench of this court it was held that the tribunal was right in coming to the conclusion that bottles and shells were plant within the meaning of the relevant provisions of the Act and that the assessee was entitled to 100% depreciation on bottles and shells and answered the question in favour of the assessee and against the

revenue.

14. At this stage, we also refer to the commentary of of Kanga & Palkhivala's "The Law and Practice of Income Tax" on page 499 which is as under:

"In deciding whether a building or structure is a plant, a functional test is to be applied--is it an apparatus with which the business is carried on or is it the setting or part of the premises in which the business is carried on; if the former it is plant, if the later it is not.

15. After referring some of the judgments the learned Author-Mr.Palkhivala in his book "The Law and Practice of Income Tax" on page 499 has further stated as under:

"Further this test should be applied having regard to the nature of the business carried on and the relation of the expenditure to the promotion of the business. Where a company operated a range of hotels, the particular decor, murals, metal sculptures and electric light fittings provided for producing an 'atmosphere' that would attract customers were held to be a "plant", they were not the setting in which the business was carried on, but the ambience offered to the customers for them to resort to and enjoy".(See IR vs Scottish & Newcastle 55 TC 252)

16. The learned counsel for the assessee has also relied on the decision of the Karnataka High Court in the case of Nippon Electronics Ltd vs CIT reported in 116 ITR 231 wherein it has been held "in deciding whether a building or structure is plant, a functional test is to be applied--is it an apparatus with which the business is carried on or is it the setting or part of the premises in which the business is carried on, if the former, it is a plant; if the later, it is not. Whether a company operated a range of hotels, the particular decor, murals, metal sculptures and electric light fittings provided for producing an atmosphere that would attract customers were held by the House of Lords to be plant, they were not the setting in which the business was carried on, but the ambience offered to the customers for them to resort to and enjoy.

17. In the case of CIT vs Shri Krishna Bottlers

Pvt.Ltd reported in 175 ITR 154 the Andhra Pradesh High Court held that "the bottles containing the soft drink can not be stock-in-trade inasmuch as the bottle by itself is not the subject of sale. The customer or retailer returns back the the bottle to the assessee after the soft drink is consumed. Likewise the shells which are sent to the customer or dealer also come back with the empty bottles and they can not also be stock in trade. What is the function these bottles and shells perform in the assessee's trade? Are they essentially tools in the assessee's business? In our opinion yes. The bottles are essential tools of the trade for it is through them that the soft drink is passed on from the assessee to the customer. Without these bottles the soft drink cannot be effectively transported. The bottles and the contents are "totally inter dependent". So are the shells. The bottles and shells satisfy the durability test for it is nobody's case that their life is too transitory or negligible to warrant interference that they have no function to play in the assessee's trade. They are, therefore, "plant" for the purpose of the Act.

18. The Andhra Pradesh High Court further observed as under:

From the aforesaid rulings, the following principles can be gathered:

(1) "Plant" in Section 43(3) of the Act is to be construed in the popular sense, namely, in the sense in which people conversant with the subject matter with which the section is dealing. In its ordinary sense it includes "apparatus" is used by a businessman for carrying on his business, but it does not include his stock in trade which he buys or makes for sale. It, however, includes all goods and chattels, fixed or movable, live or dead which tradesman keeps for permanent employment in his business.

(2) But the building or the setting in which the business is carried on can not be plant.

(3) The thing need not be a part of machine used in the manufacturing process but could merely an apparatus used in carrying on the business but having a degree of durability.

(4) Merely because the asset has a passive function in the carrying on of the business, it can not be said that it is not plant. It may have a passive or active role.

(5) The subject must have a function in the trader's operation and if it has, it is prima facie a plant unless there was good reason to exclude it from that category. It must be a tool in the trade of the businessman.

(6) Gross materiality or tangibility is not necessary, and in fact, intangible things like ideas and designs contained in a book could be plant. They fall under the category of intellectual storehouse.

(7) In considering whether a structure is plant or premises one must look at the finished product and not at the bits and pieces as they arrive from the factory. The fact that building or part of a building holds the plant in position does not convert the building into plant. A piecemeal approach is not permissible and the entire matter must be considered as a single unit unless of course the component parts can be treated as separate units having different purposes.

(8) The functional test is a decisive test.

19. The learned counsel for the assessee relied upon the decision in the case of Hotel Banjara Ltd vs CIT reported in 218 ITR 590 (pages 597-598) wherein the Andhra Pradesh High Court held as under:

"From the above discussion, it follows that for the purpose of deciding as to whether a building would be a "plant" within the meaning of the expression in section 43(3) of the Act;

'(i) the term 'plant', as used, has to be given a wide meaning; and

(ii) whether a building is a 'plant' or not has to be determined with reference to the functional test'

Yet another approach to the question would be as to whether the building was serving as the setting in which the business is carried on or a thing with which the business is being carried on. If it is a mere setting, it would not be "plant" but if it is a thing with which the business is carried on, then it would fall within the ambit of "plant". No general principle can be laid down as to whether a particular building is plant or not. The court will have to examine various aspects to find out as to whether the

building in a given case satisfies the requirements of that object with which the business is being carried on and without which that business can not be carried on, it would fall within the meaning of "plant".

So far as "hotels" are concerned, the business of a hotel may be carried on in a building which is converted into a hotel or it may be carried on in a building which is specifically designed with reference to specifications to satisfy modern needs and requirements of a hotel. As the Tribunal did not approach the question from this angle, the Tribunal has to examine the issue afresh on the material on record and decide as to whether the assessee satisfies the tests as to fall within the meaning of "plant" under section 43(3) of the Act and, if so, whether the assessee is entitled to investment allowance under section 32A of the Act".

20. In the case of CIT vs B.Venkatarao reported in 202 ITR 303 the question before the Karnataka High Court was "whether a nursing home was plant for the purpose of section 32 of the Act? It was observed that the nursing home was not an ordinary building having regard to the number of persons using it and the manner of its use and the purpose for which it was used; the building was used not only to house the patients and nurse them, but also to treat them for which various equipments and instruments were installed; it had an operation theatre, a pathological laboratory, an X-ray room, a plant for sterilisation of clothes, a plant for sterilisation of other surgical instruments, an air-conditioning room etc. Applying the functional test, it was held that the nursing home building was "plant".

21. The Patna High Court in the case of CIT vs Lawly Enterprises (P) Ltd reported in 225 ITR 154 made following observations:

"It has to be seen whether the building serves as the 'means' or merely as a 'setting' for carrying on the business. It must, however, be realised that by applying this test one would not get the same answer in cases of all kinds of hotels. This is because the expression "running a hotel business" is so wide and elastic that it may take into its fold vastly different undertakings. The word 'hotel' brings to mind very disparate [images. There are hotels of all kinds. A

building intended to be used or in fact used earlier as a residential accommodation can be converted at any time into a lodge and used for running hotel business. One finds a plethora of such hotels mushrooming in the vicinity of railway stations and bus stands, etc in any city or a big town. On the other hand, there are hotels, self contained in many ways and having a small world of their own. A large modern hotel is not a place where people merely eat and sleep; it offers manifold other services and facilities and functions as a composite organic structure. It naturally requires vast infrastructural support in the form of equipment, buildings, machinery etc. And it is possible that the building(s) housing such hotels may have certain special design and features and those building(s) may be said to form an integral part of the business of running that hotel and it may not be possible to run the hotel in question in any ordinary building, constructed without any consideration for the needs and requirements of the hotel. In those cases, the buildings may qualify as plant, but that would depend upon the facts of the case."

Therefore, the Patna High Court remanded the matter to the Tribunal as the Tribunal has not approached the question from the above angle.

22. The learned counsel appearing for the assessee has relied upon the decision in the case of S.P.Jaiswal Estates (P) Ltd vs CIT 216 ITR 145 the Calcutta High Court applying the functional test held that 'the hotel building owned by the assessee and used for the purpose of carrying on its hotel business was an apparatus with which the assessee's hotel business was carried on. It can not be treated as a setting within which or a canopy under which the assessee carried on its business. In that view of the matter, having regard to the nature of assessee's business the hotel building is to be treated as a 'plant' for the purpose of depreciation allowance under section 32."

23. Earlier, the Kerala High Court in the matter of CIT vs Damodar Corporation reported in 225 ITR 699 held that the hotel building in its entirety can not be regarded as 'plant". Subsequently, the Full Bench of the Kerala High Court in the case of CIT vs Hotel Luciya reported in 231 ITR 492 held that "considering the peculiar nature of hotel business and applying the

functional test, the hotel business is a tool of the assessee's business. Therefore, the hotel building is a plant within the meaning of section 453(3) and the same is entitled to depreciation applicable to plant."

24. All these views are in favour of assessee. However, the learned counsel appearing for the department--Mr.B.B.Naik has relied on the judgment in the matter of CIT vs Lake Palace Hotels & Motels P.Ltd reported in 226 ITR 561 in which the Rajasthan High Court has held that "the hotel business is a business in which the building is one of the components besides the other facilities like food, air-conditioning etc. The building itself is for different uses like rooms for stay, conference hall, kitchen etc. The hotels are also of different categories. The facility in the hotel differs according to star mark given to them. The facility of comfortable stay is also provided by guest houses, motels, hotels, inn etc. The building which is used in the business of hotel remains a building inspite of the fact that it is decorated by plaster of paris, timber work etc. If the skeleton of the building without decoration is building then the items by which it is decorated would not change the character of building. The item, may, however, be considered as plant subject to its use. The use of building is a setting. Building is not used as tool of the trade. Different rates of depreciation for building have been provided which also makes the legislative intent clear that the different types of buildings remains as building. The amendment of section 32(1) (v) has only clarified the legislative intent that the building of hotel is building, though by amendment a higher rate of depreciation is provided for it. In an industry no production can be normally carried on without a building where the plant and machinery is installed but for that reason the building can not be considered as plant when there is a separate entry for buildings for purpose of depreciation. Buildings may accommodate plant and machinery or living persons. It remains a building. The structure having roof and durability is considered as building. Every movable and immovable property has its categorisation. It is basically the hospitality which is provided in a hotel may by human service or by equipment, surroundings, atmosphere etc which is provided by decorated rooms beautiful furnishing. The recompense of the hotelier is for the care, facility which are provided by him by way of service rendered and not by providing room alone it could be considered as a tool of the trade. The hotel industry is service oriented industry and the better the service the higher the charges. The element of service

is dominant object and not providing the room alone. If the building of a five star hotel is a plant there is no reason why the building of an ordinary hotel should be treated differently only on account of charges for extra facilities. The difference of charges is because of extra service facilities provided and the role of building in the two types of hotels remains the same and at the same time even better services are provided in a number of guest houses.

25. There is another aspect which is to be seen is that word "plant" includes ships, vehicles, books, scientific apparatus and surgical equipment used for the purpose of business or profession. The Supreme Court in the case of Tajmahal Hotels (supra) after considering the definition of "plant" has observed that "the very fact that even books have been included shows that the meaning intended to be given to plant is wide. The word 'includes' is often used in interpretation clauses in order to enlarge the meaning of the words and phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include them. The word "include" is also susceptible of other constructions which is unnecessary to go into".

26. After reviewing these authorities of the Supreme Court and various High Courts, we have given our anxious consideration and according to us a "plant" must be given a wide meaning. It is defined by section 43(3) as including ships, vehicles, books, scientific apparatus and surgical equipment. The "plant" in its ordinary meaning includes whatever apparatus is used by a businessman for carrying on his business, not his stock-in-trade which he buys or or makes for sale, but all goods and chattels, fixed or movable, which he keeps for employment in his business with some degree of durability.

27. We have also extracted the facts which have been put by the Assessee before the Assessing Authority as well as before the Tribunal and conclusion of the Tribunal on those facts. In our view, the Assessee has not led enough evidence to show as to whether the building is to be treated as a 'plant' or not. Therefore, the fact set out as well as observations made by the Tribunal, in our judgment and Tribunal also merely

relied upon the judgment of the Madras Tribunal and came to the conclusion that Assessee's building is a plant. We are also of the view that the Tribunal shall consider the principles laid down by the Supreme Court and High Courts as well as test law laid down by us in the following para.

28. In our view, the Tribunal must consider the following tests :-

- (i) Whether the building with which the assessee is carrying on business is an apparatus used by the businessman for carrying on business?

If answer is in affirmative, then 'building' is plant.

- (ii) Whether "building" is a setting or part of premises in which the assessee has carried on business?

If answer is in affirmative, then 'building' is not plant.

- (iii) Whether the "building" of the hotel can be considered as 'plant' as defined under Section 32 of the Act?

29. We are therefore, remanding the matter to the Tribunal and direct the assessee to produce additional evidence to show whether assessee has fulfilled the tests laid down by us. The Tribunal is directed to hear both assessee and the Revenue and if the assessee is able to fulfill the tests laid down by this judgment, then assessee is entitled to depreciation. However, if the assessee is not able to fulfill those tests then the Hotel building may not be treated as a plant. In view of the same, we remand the matter to the Tribunal. The Tribunal shall consider all the facts and circumstances of the case and decide the matter in accordance with the law laid down by us.

(B.C. PATEL, J.)

murthy (K.M. MEHTA, J.)